United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-7018

To be argued by
MORRIS ZWEIBEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

J. GORDON EDWARDS, Ph.D., THOMAS M. JUKES, Ph.D., ROBERT H. WHITE-STEVENS, Ph.D.,

Plaintiffs-Appellees,

—against—

THE NEW YORK TIMES COMPANY, INC. and ROLAND C. CLEMENT,

Defendants-Appellants,

NATIONAL AUDUBON SOCIETY, INC., ROBERT S. ARBIB, JR. and ELVIS J. STAHR, JR.,

Defendants.

BRIEF FOR DEFENDANT-APPELLANT, ROLAND C. CLEMENT

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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BRIEF FOR DEFENDANT-APPELLANT, ROLAND C. CLEMENT

Preliminary Statement

This brief is submitted in support of the appeal taken on behalf of the Defendant-Appellant, Roland C. Clement, as set forth in his Amended Notice of Appeal:

A) From the Judgment entered in the above action on or about January 7, 1977;

B) From the Order denying the said defendant's motion for summary judgment originally entered January 26, 1976;

C) From the Order entered April 16, 1976 on motion for reargument;

D) From the Order dated December 8, 1976 denying said defendant's motion for Judgment N.O.V.

The above action was tried before Judge Charles M. Metzner and a jury. During the trial the complaint was dismissed as against the defendant Elvis J. Stahr, Jr. The jury rendered a verdict in favor of the defendants, National Audubon Society, Inc. and Robert S. Arbib, Jr.; and in favor of the plaintiffs and against the defendants-appellants, The New York Times Company, Inc. and Roland C. Clement, as follows:

In favor of plaintiff-appellee, Edwards, in the amount of $21,000 and plaintiffs-appellees, White-Stevens and Jukes, in the amounts of $20,000 each in respect of an alleged libel in the August 14, 1972 New York Times against defendant-appellant, Roland C. Clement and defendant, The New York Times Company, Inc.;

The jury also rendered a verdict in favor of plaintiffs-appellees in the amount of $1.00 each against defendant-appellant, Roland C. Clement, in respect of a letter written by Mr. Clement to The New York Times Company, Inc., also dated August 14, 1972.

The jury rendered a verdict in favor of the defendants on the causes of action for punitive damages. The plaintiffs are not appealing from the judgment entered thereon.

Nature of Case

The plaintiffs sued to recover damages on the theory that they were libeled by an article that appeared in the New York Times on August 14, 1972; and by a letter dated August 14, 1972 written to the New York Times.

In the April, 1972 issue of "American Birds" published by the defendant, National Audubon Society, Inc., a Foreword written by the defendant, Robert S. Arbib, Jr., to which reference is hereinafter made. In this Foreword no names were mentioned but the statement was general in nature. Thereafter, phone calls were made by John C. Devlin, a Nature Editor employed by the New York Times, on the latter of which occasions he was referred to an article written by the defendant-appellant, Roland C. Clement.

He thereafter prepared and the New York Times published the article which is claimed by the plaintiffs to be libelous.

Facts

The material facts in this case are as follows:

Plaintiff, J. Gordon Edwards, Ph.D., a professor at San Jose University, California, has been and is a resident of the State of California, is engaged in academic pursuits and scientific research in the fields of entomology and conservation, and has frequently given lectures, written papers and letters for publication, and has participated in debates dealing with scientific and other questions pertaining to the effect of DDT and related pesticides upon the environment.

Plaintiff, Thomas M. Jukes, Ph.D., has been and is a resident of the State of California and is engaged in aca-

demic pursuits and scientific research in the fields of medical physics and conservation, and has frequently given lectures, written papers and letters for publication, and has participated in debates dealing with scientific and other questions pertaining to the effects of DDT and related pesticides upon the environment. He refers to himself as "a (n) world authority on the nutritional requirements of birds". He is presently a professor of medical physics at the University of California in Berkeley and is a lecturer on nutritional science at the University of California.

Plaintiff, Robert H. White-Stevens, Ph.D., has been and is a resident of the State of New Jersey, and is engaged in academic pursuits and scientific research in the fields of plant physiology and conservation, and has frequently given lectures, written papers and letters for publication, and has participated in debates dealing with scientific and other questions pertaining to the effect of DDT and related pesticides upon the environment. He is a professor of biology at Rutgers University, New Brunswick, New Jersey.

Defendant National Audubon Society, Inc., is engaged in educational, scientific, investigative and charitable pursuits fostering recognition of the need for and furthering the preservation of wildlife and other natural resources. It is actively involved in public education in all aspects of protection of the environment, and is the publisher of the magazine "American Birds", in collaboration with the United States Fish & Wildlife Service.

Defendant, Robert S. Arbib, Jr., at all material times is and has been an employee of the defendant, National Audubon Society, Inc., and the editor of the magazine *"American Birds"*.

Defendant, Roland C. Clement, is and at all material times has been a vice president of defendant, National

Audubon Society, Inc., and at all material times was a staff biologist of that defendant.

Defendant, Elvis J. Stahr, Jr., is and at all material times has been the president of defendant, National Audubon Society, Inc.

Defendant, The New York Times Company, Inc., is and at all material times has been a corporation engaged, among other things, in the business of publishing the newspaper, The New York Times, and at all said times employed Mr. John Devlin, as a reporter.

For at least 25 years, there has raged a heated public controversy between proponents and opponents of the widespread use of the insecticide DDT and other pesticides. This controversy is a matter of paramount public interest and concern.

Plaintiffs and defendant Audubon have voluntarily participated in this public controversy, and have repeatedly expressed their views publicly.

Annually since 1900, defendant Audubon and its members have conducted a "Christmas Bird Count", in which observers venture into the field to count the number of birds of various species which they see during the count period. The results have been published annually in the magazine "*American Birds*" and its predecessor "*Audubon Field Notes*".

Plaintiffs and defendant Audubon have publicly disagreed over what are and what are not scientifically justifiable interpretations of Audubon's annual Christmas Bird Count data.

Plaintiffs' thesis, often expressed publicly in the context of the larger public controversy over DDT, has been that Audubon's Christmas Count data shows that birds have increased in numbers despite the use of DDT and

other pesticides. Defendant Audubon has publicly disagreed that plaintiffs' thesis is a scientifically justifiable use of Audubon's Christmas Bird Count data.

In the Foreword to the April, 1972, issue of its magazine "*American Birds*", Vol. 26, No. 2 p. 135 (Complaint, Exhibit I), defendant Audubon published, *inter alia*, the following material, portions of which are referred to in paragraph 9 of plaintiffs' complaint:

> "We are well aware that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals (and other data in AMERICAN BIRDS) as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.
>
> This, quite, obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this. In addition, with the constant dimunition of natural habitat, especially salt- and freshwater marshes, it it self-evident that species frequenting these habitats are less common than formerly.
>
> The apparent increases in numbers of species and individuals on the Christmas Bird Counts have, in most cases, nothing to do with real population dynamics. They are the result of every-increasing numbers of birders in the field, better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification.

> With increased local coverage by the press of Christmas Bird Count activities, it is important that Count spokesmen reiterate the simple and truthful fact that what we are seeing is result of not more birds, but *more birders*. Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

None of the plaintiffs were named or otherwise specifically identified in the aforesaid April, 1972, edition of "*American Birds*".

In the August 14, 1972, edition of The New York Times, there appeared under the by-line of John Devlin an article captioned "Pesticide Spokesman Accused of 'Lying' on Higher Bird Count" containing, *inter alia*, the following language, portions of which plaintiffs cite in paragraph 10 of their complaint:

> "Segments of the pesticide industry and certain 'scientist-spokesmen' are accused in the current issue of American Birds of 'lying' by saying that bird life in North America is thriving despite the use of DDT.
>
> The publication is sponsored by the National Audubon Society in collaboration with the United States Fish and Wildlife Service. The delayed current issue is devoted principally to results of the 72nd Christmas Bird Count.
>
> The accusation against the pesticide industry and some of its spokesmen is contained in the forward by Robert S. Arbib, Jr., editor.
>
> He wrote that the reason the Christmas Bird Count showed more birds, as cited by pesticide industry spokesmen, was not that there were more

> birds these days, but simply 'more birders' who go out on the annual counts and thus increase the size of the totals reported:
>
> *Accused Men Named*
>
> The persons under attack were not identified in the publication.
>
> However, Mr. Arbib said in an interview that they included Robert H. White-Stevens, formerly with American Cyanamid Company, and now in the Bureau of Conservation and Environmental Science, Rutgers University: Thomas H. Jukes, a biochemist at the University of California, Norman E. Borlaug, Nobel Prize winner, Dr. J. Gordon Edwards, a lecturer and professor of entomology at San Jose State College; and Dr. Donald A. Spencer, a retired ecologist and lecturer of the National Agricultural Chemical Association who is now a private consultant and a member of the National Audubon Society."

The above-quoted caption to The New York Times article of August 14, 1972, was not written by New York Times reporter John Devlin. The body of the article was written by Mr. Devlin after he had had telephone conversations with defendant Arbib and with plaintiffs White-Stevens and Jukes.

Mr. Devlin communicated with no person at Audubon other than Mr. Arbib in connection with the portion of the article Mr. Devlin wrote, and Mr. Arbib made no statement to Mr. Devlin in the course of their telephone conversations which did anything more than identify the named individuals as among the persons described in the aforesaid Foreword to "American Birds".

On August 14, 1972, the following letter (Complaint, Exhibit III) of which plaintiffs complain in paragraph 11 of their complaint was sent to the editor, New York Times:

"August 14, 1972

Editor
New York Times
229 West 43d Street
New York, New York

Dear Sir:

Jack Devlin's punchy piece on the Audubon Christmas Bird Count summary from the April issue of AMERICAN BIRDS unfortunately leaves out the most important qualifications we attach to these counts.

It is not simply that more birds are reported because there are more birders, but that we have more birders who are also better birders, who have 'better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification.'

This is why our counts, though they have many uses, are not a reliable clue to population changes from decade to decade. There is no way around this problem in interpretation because we do not know exactly how much the birder himself has been improved as an observer over the years.

Nor do we like to call people liars, but those who have most consistently misused our data—Robert H. White-Stevens of Rutgers University, Thomas H. Jukes of the University of California, J. Gordon Edwards of San Jose State College, Donald A. Spencer of the National Agricultural Chemical Association, and more recently Nobel laureate Norman

E. Borlaug—recently have had time to learn from our patient explanations of their misinterpretations of our data over the several years of the DDT controversy.

Sincerely,

Signed for Arbib by R. C. C. after telephone conversation; Arbib in N. Dak. at A. O. U. Robert S. Arbib, Jr."

This letter, which was not printed by The New York Times, was written by defendant Clement.

It is in the context of the public controversy over DDT and the ancillary public controversy over the significance of Audubon's Christmas Bird Count data thereto that the above allegedly defamatory statements of which plaintiffs complain, were made.

Each of the plaintiffs is, and must be viewed in the context of this action, as a public figure, and the Court below has so held.

Motions Made on Behalf of Defendant-Appellant Roland C. Clement

Motions were made for summary judgment which were renewed; motions were made during the trial and at its conclusion on behalf of the Defendant-Appellant, Clement; a motion on his behalf for Judgment N.O.V., was also made; all of which were denied and Orders thereon entered by Judge Metzner. This appeal is from the denial of the aforesaid motions, as well as from the judgment entered against Roland C. Clement after trial.

Testimony

The plaintiffs submitted as their first witness, John C. Devlin, the reporter for the New York Times for 25 years and in recent years specializing in nature stories (49).* He testified to his acquaintanceship with the National Audubon (50) and his familiarity with the Christmas bird counts (53).

Upon receipt of the April 1972 issue of American Birds, which was marked as Plaintiffs' Exhibit 2 (19, 58), he read the Foreword and telephoned Mr. Arbib, which he believes, was sometime in late July or early August, 1972 (55). In the first conversation Mr. Arbib expressed great reluctance to give the names of any persons about whom the article was written (66). It was his testimony that he was thereafter given the names of the plaintiffs and two others, Dr. Borlaug and Dr. Spencer. The only one with whom he was familiar was Dr. Borlaug.

He tried to reach the parties whose names he says he was given by telephone and apparently he did reach the plaintiffs, Dr. Jukes and Dr. White-Stevens.

Thereafter, he prepared three drafts, which apparently was an unusual procedure, of the article which ultimately was published in the New York Times on August 14. This article was marked plaintiffs' Exhibit 1 in evidence (73-74).

Mr. Devlin recalled that Dr. Spencer, who had not sued, told him that the article was "almost libelous" (95). He further recalled his telephone conversations with and receipt of a communication from Dr. White-Stevens that the article was totally erroneous and almost libelous (95). He further had communications from Dr. Jukes with whom

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* (Numerals refer to pages in the record on appeal.)

he similarly had spoken prior to publishing this article. Despite this fact, he did not consult the Legal Department of the New York Times (102).

In the course of his testimony, Mr. Devlin admitted that Arbib told him it is better not to use any names (119); that he was reluctant to give him names (121); and that Arbib had given him these names as people who had misused the bird counts.

In his notes, as shown by Audubon's Exhibits A, A5, A6 and B1 relating to his phone conversations with the plaintiffs and with Dr. Spencer, not only does the word "libelous" appear but the word "Wow" (132) from all of which Mr. Devlin found that this item was newsy and dramatic (133).

Dr. White-Stevens testified on his own behalf that he was a professor of biology, specializing in chickens and antibiotics. At one time he was employed by American Cyanamid (57, 160) and since 1969 has been on the faculty of Rutgers University (159).

He has been involved in environmental causes (161). The first he knew about the New York Times was when it was shown to him by his graduate students on the day of its publication. He recalled speaking to Mr. Devlin on August 4th, which phone conversation took approximately ¾ths of an hour (166, 172), at which time he suggested that Mr. Devlin check the article very carefully since it may be libelous.

He wrote to Mr. Devlin (Audubon's Exhibit 2 in Evidence) in which he referred to the conservation of the human race and the bird count controversy. Reference was made to an article by one Mr. Marvin with respect to the effect of DDT on bird life. He expressed disappointment that Devlin did not use in his article information that this witness had previously furnished expressing

more concern with his material on bird counts than on the accusation that he was a liar.

He admitted that no charge was being made that Audubon made any statements to gain economically. He further testified extensively that DDT represented a "hot controversy" (20). He expanded on his phone conversation with Mr. Devlin.

During his examination an effort was made to put into evidence Exhibit NNN, an article written by Dr. White-Stevens on the grounds that the same went to the issue of damages (221, 224), which the Court refused to admit into evidence. This article was captioned "Fads & Falacies" in which strong language was used against persons taking the opposite point of view in the DDT controversy.

Exhibit PP, which the Court likewise refused to admit into evidence, consisted of a speech made by Dr. White-Stevens in which he referred to "spurious tracts and articles obviously more attentive to circulation than veracity, which deliberately continue to seek to foment fear and consternation among the public—".

This witness admitted that his position was the same that he had suffered no loss of salary (232); he cannot say that he lost friends (233); he did say that people advocating a ban on DDT were advocating genocide (235). He testified about his son's conversation (237) after the latter had read the article. It is very significant he was not dismissed by any of the societies nor were any charges brought against him (240). In other words, he did not demonstrate any pecuniary loss nor any loss in station, position or regard in the scientific community of which he was a part.

The next witness called was Dr. J. Gordon Edwards, one of the plaintiffs, who is an entomologist and deals primarily with insects.

He detailed his qualifications and testified that he has written about birds and is an Audubon member (245). He first learned of the article when he was told about it by rangers while he was in the Glacier National Park on behalf of the Department of Interior. This article was also mentioned by visitors at the park and that he had received copies of it from students of his at San Jose College.

He testified concerning the DDT controversy and the position of Audubon, which was opposed to its use (254).

Offers were made to put in evidence letters written by this witness (256-263, 268) and articles in which this witness used vigorous language against opponents to the use of DDT, comparing them to Hitler, Nazi brutality and extermination, genocide and even went so far as to say that Audubon perpetrated frightening lies (264), which offer was refused by the Court.

There was no question but that he had previously called Audubon liars (273, 275).

This witness testified that he still has the same position at San Jose University in California; that his salary has not gone down (277-278); that no charges were brought against him by any honorary organizations to which he had earlier testified as being a member. When he received a phone call from Devlin on August 7, 1972, he told him that the article contained in American Birds was untrue (291) and that he had written to Dr. Stahr, the president of Audubon.

The same situation prevailed with him as with the other plaintiffs and the proof was undeniable that none of the grants which he received had been decreased by reason and said article; nor could he establish that he suffered any decrease in salary because of that article. He still has the same position. There was no proof on

his part that he was in any wise affected in the scientific community because of this article. There was no question that the controversy on the effect of DDT was a hot one and in fact, in his articles he made reference to "the big lie" and offers to place such articles in evidence were denied (304, 306).

The plaintiffs called as a witness on their behalf, an attorney, Victor J. Yannacone, (324 et seq.) who had been employed by the Environmental Defense Fund, which was funded privately. This fund was established in 1967 (326) and he remained with it until 1969, at which time his relationship terminated.

He testified on Clement's participation at the meetings and that Clement was the liaison between Audubon and the Environmental Defense Fund. He did not know Dr. Edwards and knew Dr. White-Stevens only in passing (325). His primary connection was with Dr. Jukes.

It was his testified that meetings were held, at which time the subject of silencing Dr. Jukes came up; that Clement was sometimes present.

The basic strategy involved by the EDF was to establish that statements made by opponents to the position advocated by the EDF was to show that such statements were erroneous or "hyperbole" (337), and were to be employed in cross-examining the opponents in litigation (337).

Clement's participation was to use the research facilities of National Audubon Society to obtain statements and remarks made by those taking the contrary position to their's in the public controversy, which could be of service on cross-examination (339).

The party most often discussed was Dr. Jukes (340). The words "Smear in the press" were a topic of discussion (343).

He admitted that Jukes' letters were obtained through Mr. Clement (346); further, that the press came to them; that they never went to the press (350).

The next witness called was Mr. Maurice Friedman, (351 et seq.) a coordinator of technical services at the New York Public Library, whose testimony primarily concerned itself with the circulation of the New York Times and the fact that they have an index system and a bank of information.

The plaintiffs then called as a witness, Philip Marvin, a consultant in crop protection (366), who became involved in the Christmas bird count. He testified that the position taken by the plaintiffs, Dr. White-Stevens and Dr. Jukes on the bird count was true.

He admitted that in recent years the methods of counting birds was far more sophisticated than it previously had been. He was not associated with the American Ornithologist's Society nor did he publish on the subject of birds (389).

At the close of the plaintiffs' case motions were made to dismiss the complaint upon the grounds that there was no proof of libel, no proof of malice and no proof of pecuniary damages (399).

The Court held that the Foreword in the American Birds in and of itself was not libelous (401). However, when the names were supplied, a libel was effected (402). It was the Court's position that the plaintiffs do not have to prove pecuniary damages and that the same can be inferred under the New York law (400). He had previously had ruled that plaintiff had to prove actual malice (13).

At this point the action against the defendant, Stahr, was dismissed by the Court.

The Defendant's Case

Robert S. Arbib then took the stand on his own behalf and testified to his educational background; that he was elected to the Union of Ornithologists in 1955; that he was President of the Linnean Society, the second oldest ornithological society in the United States and his active participation in bird life and count. He has been editor of the American Birds since December 1, 1973 (424) and that he wrote the Foreword.

He insisted that there are more birders now than there were heretofore (429) and that the bird count only covered 1.2% of the United States and consequently, has little worth in determining whether DDT affected bird growth.

Conerning the telephone calls from Mr. Devlin, Mr. Arbib testified that on the first call he told Mr. Devlin that the warning contained in his Foreword was only a generalized warning and that he did not know the names of any participants (434).

Following the second call from Mr. Devlin, this witness went to Mr. Clement and got his manuscript, which is marked Audubon's Exhibit D in evidence. His recollection of the third conversation with Mr. Devlin was clear on the subject that he told him that under no circumstances were they calling any of the plaintiffs liars or paid liars. This witness informed Mr. Devlin where the plaintiffs and the other persons named in Mr. Clement's article could be reached, which is a clear demonstration of the fact that the subject involved was the validity of the bird counts as a factor in the DDT controversy and did not go to the element of calling anyone liars. He had never heard of Dr. White-Stevens or Dr. Edwards and he harbored none of the plaintiffs' ill-will (443). He had gotten the idea of the sentence referring to "paid liars"

from general office talk on lying during which the tobacco industry was used as a parallel situation.

It was his recollection that Clement told him that they did not call people liars (459) and that the words employed in the Foreword were only a generalized warning and were not intended to personalize in any way.

He testified concerning the letter of August 14th which was written by Mr. Clement under Mr. Arbib's name and the circumstances surrounding it.

The jury exonerated Mr. Arbib thereby demonstrating its credence in his testimony.

Mr. Clement was then called as a witness on his own behalf and testified that he was a Vice President for Biology at Audubon and wrote "Pesticide in Controversy" (491).

After reading Mr. Arbib's article he was the one who suggested the phrase starting with "parroting . . .". He knew the plaintiffs and had debated Dr. White-Stevens. It was his testimony that the plaintiffs were not ornithologists; that DDT is not their field of expertise; that he has devoted considerable time and study to this area of scientific enterprise and that the bird count cannot be used to support the contention that DDT does not affect bird life.

It was his testimony that Mr. Marvin's tests on birds was invalid (498). He never called the plaintiffs liars (504); and merely referred to them as mis-quotes and misuse of data (509). In this paticular field of endeavor it was his contention that the plaintiffs were not qualified (519, 520). He testified concerning the background of the letter of Aug. 14, 1972, written to the New York Times, and an office memo he wrote the same day. He explained their import. He only accused the plaintiffs of misusing data and distoring facts (507, 509),

The next witness called on behalf of the defendants, Audubon, Arbib and Clement, was Dr. Charles F. Wurster, who has done independent research on the effect of DDT on bird life (535).

He testified that the plaintiffs were not expert in this field and that the Christmas count to support their position was worthless (537). He demonstrated how Mr. Marvin's study on robbins is inaccurate (541). With respect to the EDF he was an original Trustee and attended all the meetings.

Clement became a Trustee only in 1969, but did not attend most meetings. He was firm in his testimony that no one was ever silenced and that they never used the word "smear".

Motions to Dismiss

Motions were made at the close of the plaintiffs' case and were renewed at the close of all the proof to dismiss the complaint and for a direction of a verdict which were denied by the Court. The Court did dismiss any claim based upon the Foreword in American Birds since no names were mentioned (552). On the issue of damages, he took the position that the jury can presume compensatory damages.

After the jury had been sent out to deliberate, they returned with questions seeking counsel on compensatory damages and on whether they should allocate the percentage of damages. The jury was instructed by the Court that they were not to allocate percentage of damages and with respect to guidance and awarding compensatory damages, he left it entirely within their province.

Questions Presented

The Court below having held that the plaintiffs are public figures, and that the controversy was a public nature, the issues on this appeal are as follows:

1. Did the defendant-appellant, Clement libel the plaintiffs?

   It is the contention of this defendant-appellant that there is no proof in this record to support such finding either as to the Times Article of Aug. 14, 1972, or the letter of the same date.

2. Was the defendant-appellant, Clement, guilty of actual malice?

   It is the contention of this defendant-appellant that there is no proof in this record to support such finding.

3. Should the motions for summary judgment, for the direction of a verdict, and the motion N.O.V. all made on behalf of this defendant-appellant have been granted?

   It is respectfully urged that the court below erred in not dismissing the complaints of the plaintiffs as against this defendant-appellant, Roland C. Clement; and in refusing to direct judgment in his favor.

POINT I

Plaintiffs are public figures involved in a controversy of public interest, and any statements made were constitutionally protected. They had the burden of establishing (1) that they were libeled by Clement; and (2) that Clement was guilty of actual malice.

Judge Metzner, in his opinion denying the motions for summary judgment found (a) that "the controversy surrounding the use of DDT is of interest to the public"; and (b) that "the plaintiffs are public figures in the context of this action."

The constitutional privilege accorded participants in such controversy was articulated in *The New York Times* v. *Sullivan,* 376 U. S. 254. In *Rosenblatt* v. *Baer,* 383 U. S. 75 (1966) and in *Time* v. *Hill,* 385 U. S. 374 (1967) the concept of public interest and concern was expanded so as to afford the constitutional protection to comment on public affairs.

The Court in *Time* v. *Hill* quoted with approval from *Thornhill* v. *State of Alabama,* 310 U. S. 88, 102 (1940):

> "Freedom of discussion if it would fulfill its historic function, must embrace all issues upon which information is needed or appropriate to enable members of society to cope with the exigencies of their period."

The law was clarified in the decisions rendered in *The Associated Press* v. *Walker Publishing Co.* v. *Butts,* 388 U. S. 130 (1967) so as to define public figures involved in matters in which the public has a justified and important interest.

In *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968), the Supreme Court further developed the standard of "reckless disregard" as follows:

> "In Garrison v. Louisiana, 379 U.S. 64 . . . the opinion emphasized the necessity for a showing that a false publication was made with a 'high degree of awareness of . . . probable falsity' . . . reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

In *Gertz* v. *Robert Welsh, Inc.,* 418 U. S. 323 (1974), the Supreme Court reviewed the question of who qualifies as a public figure, and included those "who have thrust themselves into the forefront of particularly public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment."

Clearly, in the instant case the proof establishes that the plaintiffs were public figures involved in an issue of public concern and any statements made were constitutionally protected. As will be demonstrated hereinafter, plaintiffs did not prove any libel by Clement; nor any actual malice on his part.

POINT II

As a matter of law, the record is devoid of any proof sufficient to charge defendant Clement with responsibility for any libel set forth in the New York Times article of August 14, 1972; nor that the letter of August 14, 1972 was libelous.

Reviewing the article printed in *"American Birds"*, it is clear that no names were mentioned, whether they were those engaged in the controversy, or were parodying "something" they knew little about"; or were paid to lie. We, therefore, find three different segments to which reference is made. In the article published in The New York Times, there is nothing which accuses those persons named therein as either liars or paid to lie. The article itself states in part:

> "The persons under attack were not identified in the publication."

Apart from the headline used in the article, there is nothing therein to identify the plaintiffs herein in any category. The headlines were prepared by persons employed by defendant The New York Times who obviously had never been in communication with either defendant Audubon or any individual defendants; and in fact, Devlin the reporter who wrote the article, could not identify those persons and insisted that he had not read the headline until after the publication. Nothing in The New York Time's article amplifies that which was said in the Foreword to the *"American Birds"* and any characterization of the Foreword appearing in that article must yield to the language of the article itself insofar as the appraisal of any allegedly libelous utterances on the part of Clement is considered.

The only material from Audubon sources appearing in The New York Times article not previously contained in the Foreword to "*American Birds*", are the names of "the persons under attack" in that article, including the names of the three plaintiffs. The third alleged libel consists of a letter written by Mr. Clement to the editor of The New York Times, dated August 14, 1972, which did not appear on the pages of The New York Times. That letter reasserts Audubon's position that the Bird Counts are not a reliable clue to bird population changes and contains this statement:

> "Nor do we like to call people liars, but those who have consistently misused our data—[naming the plaintiffs] certainly have had time to learn from our past explanations of their misinterpretations of our data over the several years of the DDT controversy."

Plaintiffs' extensive writings pertaining to the Audubon Christmas Bird Counts in the context of the pesticide controversy was developed during the trial. Some of plaintiffs' more vituperative writings which characterize defendant Audubon as a deliberate publisher of lies, participants in *de facto* murder plot against the human race, and as playing an active part in the degradation of human life and welfare with an underlying resentment of human beings and all their works, were offered in evidence but refused by the trial court.

There is no evidence that Mr. Clement spoke or wrote to Mr. Devlin or anyone at The New York Times, or of any act or omission on the part of Mr. Clement which, as a matter of law could impose responsibility upon him for the publication of The Times article, or any libel contained therein.

There is a total absence of any proof which ties Mr. Clement in any matter, either by utterance or republication, to The New York Times article of August 14, 1972. The testimony of Messrs. Devlin, Arbib and Clement, the only witnesses who might have inculpated Mr. Clement in the publication of The New York Times article is completely devoid of any basis upon which Mr. Clement could legally be charged for any libellous words which appeared in that article.

Mr. Devlin testified that the person he spoke to at Audubon in his initial work on the article which ultimately appeared on August 14, 1972, was Mr. Arbib (65-70, 78, 86-91, 117-121, 133-135). At no time did Mr. Devlin or any other witness make mention of any communication from Mr. Clement to Mr. Devlin or The New York Times leading up to the August 14, 1972, article. Mr. Arbib's testimony confirms this fact (434-5).

Mr. Arbib testified that upon being pressed by Mr. Devlin for the names of the individuals referred to in the Foreword to *American Birds,* he went to Mr. Clement who gave him a manuscript Mr. Clement had written for "Environmental Affairs" (438-9). The manuscript in its entirety is in evidence as defendant Audubon's Exhibit D. Mr. Arbib got the names from this manuscript and gave them to Mr. Devlin. The names were read by Mr. Arbib to Mr. Devlin from the manuscript as were the locations of those named (441).

Mr. Clement did not give Mr. Arbib any names prior to reading the *American Birds* Foreword (446), and his only suggestion upon reading the Foreword was the addition of the phrase "or is parroting something he knows little about" (447-8).

Mr. Arbib was not certain whether Mr. Clement had told him initially of the misuse of the Aubudon bird

count data (456-8). But Mr. Arbib testified categorically that Mr. Clement told him: "we are not calling anyone specifically paid liars . . ." (459) and conditioned his non-objection to giving the names to Mr. Devlin, by saying "We don't have any knowledge of anyone being paid liars, and all we want to say is that they have been consistent misinterpreters of the information in *American Birds*" (459).

Mr. Clement testified that when Mr. Arbib asked him for the names to satisfy Mr. Devlin, that he said "Bob, I'm busy now, but I have discussed this entire controversy in manuscript, which I have here, and I will ask my secretary to give you a copy of this manuscript. Look it over for yourself and use whatever data you please" (501). That article is in evidence as defendant Audubon's Exhibit D. There is no charge made in the complaint before this Court that this article was libellous.

There is not a shred of evidence in the entire record that any phrase or statement of Mr. Clement's is found in The New York Times article, much less a libel.

The law of New York is that a person who utters non-libelous words or even libelous words to a newspaper reporter where such words do not appear in the newspaper in a substantially accurate fashion, cannot be held liable in respect of the newspaper publication which follows. *Schoepflin* v. *Coffey*, 162 N.Y. 12, 17, 18 (1900). In that case the defendant maliciously slandered or libelled the plaintiff in the presence of several newspapers and wire service reporters.

The question presented in the Court of Appeals was if the proof had been sufficient to justify the trial court in submitting to the jury whether the defendant caused or procured the publication of the alleged libel. In determining this question in the negative the court stated:

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> "In discussing this question, we shall assume that a person who requests, procures or directs another to publish a libel, or connives at or assists in its publication, is liable therefor. But to justify a jury in finding a defendant liable for such publication, there must be some evidence that it was procured by him, or that he was guilty of some affirmative act which secured or induced it. The mere speaking of words in the presence of third persons that are not actionable *per se* would amount to a mere slander, even if special damages were alleged, and their repetition or the printing and publication of them by the independent act of a third party, would not render the person speaking them responsible therefor." (p. 17)

Here, the case is even stronger for Mr. Clement. He spoke to no reporter. He made no libelous statement. All he did was give Mr. Arbib a non-defamatory manuscript for communication of certain names therein to Mr. Devlin stressing that he and the Audubon Society were not calling any persons liars. There is no contrary evidence.

Moreover, none of Mr. Clement's language in any respect has been shown to have been published in the August 14, 1972, New York Times article. How can he be held liable for the publication of words which were not his? The answer is he cannot. You cannot have republication of a libel without reporting either verbatim or in substances the defamatory material. *Klein* v. *Biben*, 296 NY 638 (1946); *MacFadden* v. *Anthony*, 117 NYS 2d 520 (NY Co. 1952).

In *Storch* v. *Gordon*, 23 Misc. 2d 477, 481 (Kings Co. 1960), the plaintiff alleged that the defendant had maliciously published false and defamatory matter in the

presence of the press which described the plaintiff as the father of her child, and the New York Mirror republished that statement. On reargument when the newspaper article was put before the court, it was seen to merely recite that a paternity proceeding was instituted against the plaintiff who denied the charge. The action was dismissed because the "same defamatory matter" was not published in the newspaper.

Here, the same *non*-defamatory matter of Mr. Clement was *not* published in The New York Times.

A search of the applicable authorities in this State, or elsewhere in the United States, did not disclose any decision which upheld a charge of libel against a person who made non-defamatory utterances out of the presence of the press where those utterances were subsequently called to the attention of the press, and did not appear either in the substance or verbatim in the newspaper article held to be libellous. That is what would happen here if this motion is denied.

The press is notorious for misstating the comments of persons engaged in newsworthy activities. Unrestricted liability on the part of these persons for newspaper publications of words they did not use would be a gross infringement of their personal and constitutional rights.

The letter of Aug. 14, likewise, was not libelous as a matter of law; and the trial court's direction to the contrary was objected to by Clement's counsel (644, 645). It only related to the misinterpretation and abuse of data.

POINT III

There was no evidence of actual malice on the part of defendant Clement, which would warrant the submission of the issue of his responsibility for any libel contained in the August 14, 1972, New York Times article to the jury; or the letter of August 14, 1972.

No evidence was adduced upon this trial of "actual malice" on the part of the defendant Clement against any of the plaintiffs herein with respect to The New York Times article published on August 14, 1972.

There is no evidence of "actual malice" by defendant Clement which, as a matter of law, comes remotely close to satisfying the requirement that plaintiffs sustain their burden of establishing such "actual malice" by clear and convincing evidence, and defendant Clement should be granted judgment notwithstanding the verdicts in favor of the three plaintiffs concerning The New York Times article for the additional reasons that he has not been shown to have been guilty of "actual malice" vis-a-vis the August 14, 1972, New York Times article.

At the close of the plaintiffs' case, as well as at the close of the entire case, appropriate motions were made for directed verdicts, upon the grounds, *inter alia*, that there was a failure of proof of any libelous conduct on the part of the defendant Clement, and further, there was a failure of proof of any actual malice on his part with respect to The New York Times article, as well as a failure of proof as to his responsibility with respect to the publication of said article. The plaintiffs failed in their burden of establishing actual malice on the part of Clement.

See, *Miller* v. *News Syndicate Co.*, 446 F2d 356 (2nd Cir. 1971); *Guitar* v. *Westinghouse Elec. Corp.*, 396 F. Supp. 1042 (1975).

There is not a scintilla of evidence that defendant Clement was actuated in whatever obscure fashion he is tied to The New York Times article of August 14, 1972, or in any other respect, by "actual malice" toward plaintiffs Edwards or White-Stevens.

Thus, the only witness relied upon by plaintiffs to establish malice, Mr. Yannacone, testified that the name of Dr. Edward was unknown to him during the period of his testimony and that Dr. White-Stevens was mentioned "in passing" (335).

As to Dr. Jukes, Mr. Yannacone testified that at some EDF meetings Dr. Jukes was mentioned (335); that the subject "how you silenced Dr. Jukes" came up (336); that Mr. Clement was sometimes present at those meetings at which the method of "silencing" was discussed (336); and that this method was to "induce" a scientist who had made statements the EDF considered challengeable to testify, test them or cross-examine and utilize the trancript (336-8).

Mr. Yannacone's testimony with respect to the conferences or meetings at which Mr. Clement was present, was vague and inconclusive and failed in any respect to quote any actual language used by Mr. Clement with respect to any plaintiff in this case.

Mr. Yannacone's testimony related entirely to conversations and meetings had with respect to litigation brought by the EDF for which he was at the time the attorney. At no point in his testimony did he quote any language of Mr. Clement as directed against these plaintiffs, or in fact any others in this heated public controversy. At best, his testimony was vague, indefinite and consisted of innuendo and hints rather than straight-forward statements of fact.

The testimony of Mr. Yannacone has no probative value, we submit, with respect to the state of mind of defendant Clement toward the three plaintiffs herein.

The EDF had some meetings, Clement attended some of them, and the words "smear in the press" were used at those meetings in the context of discrediting Dr. Jukes as a scientific observer by utilizing his writings to cross-examine him under oath which was never done.

The law requires a great deal more than that sort of trivial, speculative, indefinite hinting to show actual malice. It requires the specific publication of a libel which is proved to be false by a person who *knows* of its falsity or *entertains serious doubts* as to its truth. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 387 (1954); *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968); *Beckley Newspapers Corp.* v. *Hanks,* 389 U.S. 81, 84-85 (1967); *Medina* v. *Time, Inc.,* 439 F.2d 1129, 1130 (1st Cir. 1971); *Washington Post Co.* v. *Keogh,* 365 F.2d 965, 972 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967).

What did defendant Clement publish that has been proved false or that he knew or entertained doubts about, that was published in The New York Times article of August 14, 1972? The answer is nothing whatsoever. "Ill will, bias, spite, or prejudice standing alone are not sufficient to constitute actual malice." *Goldwater* v. *Ginsberg,* (2d Cir. 1969) 414 F.2d 324, 342, *cert. denied,* 396 U.S. 1049 (1970). No proof of *any* of those mental conditions has been shown to have existed in Mr. Clement.

It is not actual malice for a party with one point of view on a public question in controversy to seek to discredit the views of those on the other side, and mere general hostility does not constitute actual malice. *Garrison* v. *Louisiana,* 379 U.S. 64, 73 (1964); *Greenbelt Co-op Pub.* v. *Bressler,* 398 U.S. 6, 12 (1970).

Here, there is no proof of even general hostility on the part of Mr. Clement.

On the record in this case there is no basis, as a matter of law, which would support a verdict in favor of these plaintiffs and against the defendant Clement for the publication of the article in The New York Times on August 14, 1972 or the letter of the same date.

CONCLUSION

The judgment entered in favor of the plaintiffs against the defendant-appellant, Roland C. Clement, should be reversed; and judgment should be entered dismissing their complaints.

Respectfully submitted,

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CROWE, MCCOY, AGOGLIA, FOGARTY
& ZWEIBEL P.C.
Attorneys for Defendant-Appellant
Roland C. Clement

CHARLES L. TROWBRIDGE
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376—Affidavit of Service by Mail The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

United State s Court of Appeals for the Second Circuit

J. Gordon Edwards, PHD, Thomas M. Jukes, PHD and Robert-H. White-Stevens, PHd.,

Plaintiffs-Appellees,

against

The New York Times Company, Inc. and Roland C. Clement,

Defendants-Appellants.

National Audobon Society, Inc. et al., Defendants

State of New York, County of New York, ss.:

Bernard S. Greenberg, being duly sworn deposes and says that he is agent for Crowe, McCoy, Agoglia & Fogarty the attorneys for the above named Defendant-Appellant Clement herein. That he is over 21 years of age, is not a party to the action and resides at

162 East 7th Street, New York, N.Y.

That on the 8th day of March, 1977, he served the within

Brief of Appellant Roland C. Clement

upon the attorneys for the parties and at the addresses as specified below

Rothwell, Capillo & Berntson,
Counsel to the attorney for Plaintiffs-Appellees,
1225 19th Street, N.W.
Washington, D. C.

by depositing two true copies.
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 8th day of March, 1977

Roland W. Johnson

Bernard S. Greenberg

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

375—Affidavit of Service

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

United States Court of Appeals for the
Second Circuit

J. Gordon Edwards, PhD, Thomas M. Jukes, PhD.
Robert H. White-Stevens, PHd.,

Plaintiffs-Appellees,

against

The New York Times Compay, Inc. and
Roland C. Clement,

Defendants-Appellants,

National Audubon Society, Inc., Robert S. Arbib, Jr.
and Elvis J. Stahr, Jr.,

Defendants.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Afrim Haskaj,

being duly sworn,

deposes and says that he is over the age of 21 years and resides at
1481 42nd Street, Brooklyn, N.Y.

That on the 8th day of March , 1976 77

he served the annexed Brief for Defendant-Appellant, Roland C. Clement upon

Randolph J. Seifert,
Attorney for Plaintiffs-Appellees,
11 East 44th Street,
New York, N.Y.

Gifford, Woody, Carter & Hays,
Co - Counsel for Defendant-Appellant Roland C. Clement,
14 Wall Street,
New York, N.Y.

Cahill, Gordon & Reindel,
Attorneys for Defendant-Appellant
The New York Times Company, Inc.
80 Pine Street,
New York, N.Y.

in this action, by delivering to and leaving with said attorneys

two true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 8th day of March, 1975 7

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4[illegible]
Qualified in Delaware County
Commission Expires March 30, 1977

Efrem Hoskoy

375—Affidavit of Service — The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

UNITED STATE COUR T OF APPEA LS FOR THE SECOND CIRCUIT

J. Gordon Edwards, PHd, Thomas M Jukes, Phd
Robert H. White-Stevens, PHd,

Plaintiffs-Appellees

against

The New York Times Com pany, Inc. and
Roland C. Clement, Defendants-Appellants,

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Afrim Haskaj being duly sworn,

deposes and says that he is over the age of 18 years and resides at 1481 42nd St., Brooklyn, N.Y.

That on the 8th day of March 1977 at 11 East 44th St., NY NY he served the annexed Brief for Appellant Roland Clement upon Randolph J. Seifert

in this action, by delivering to and leaving with said Roland F. Seifert two true copie thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 8th day of March 1977

Afrim Haskaj

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977